

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUN 14 2005
Federal Communications Commission
Office of Secretary

In the Matter of)
)
Amendment of Section 73.202(b))
Table of Allotments)
FM Broadcast Stations)
Enfield, New Hampshire; Hartford and)
White River Junction, Vermont; and)
Keeseville and Morrisonville, New York)
)

MB Docket No. 05-162

To: Office of the Secretary

Attention: Chief, Media Bureau

REPLY COMMENTS

NASSAU BROADCASTING, III, L.L.C. ("Nassau"), pursuant to Section 1.415(a) of the Commission's Rules, 47 C.F.R. § 1.415(a), hereby files its Reply Comments.¹ The NPRM in this proceeding proposes changes to the FM Table of Allotments, 47 C.F.R. § 73.202(b), that serve the public interest by providing two first local services and comply with the Commission's technical rules.² Hall Communications, Inc. ("Hall") and Radio Broadcasting Services, Inc. ("RBS") filed comments opposing the proposed changes. Neither Hall nor RBS provide a credible challenge to the public interest benefits of Nassau's proposed changes to the FM Table of Allotments. Instead, Hall and RBS allege phantom procedural deficiencies in the rulemaking proposal to derail the proposed changes. The Hall Comments included a counterproposal proposing only one first local service (the "Hall Counterproposal").³ The Commission should grant the proposals contained in

¹ The Notice of Proposed Rulemaking in this proceeding authorized the filing of Reply Comments by June 14, 2005. See *Enfield, New Hampshire; Hartford and White River Junction, Vermont; and Keeseville and Morrisonville, New York*, 20 FCC Rcd 7587 (Aud. Div. 2005) (the "NPRM"). Thus, these comments are timely filed.

² See *Id.* at ¶4.

³ Nassau reserves its rights to comment on the Hall Counterproposal and the comparative merits of the Hall Counterproposal and the Nassau Petition when the Commission places the Hall Counterproposal on Public Notice.

the NPRM as in the public interest, amend the FM Table of Allotments accordingly, and deny the Hall and RBS Comments and the Hall Counterproposal. In support thereof, the following is hereby shown.

On December 22, 2004, Nassau Broadcasting filed a petition for rulemaking proposing the following changes to the FM Table of Allotments: (1) allocate Channel 282A to Enfield, New Hampshire, as that community's first local service; (2) reallocate Channel 282C3 from Hartford, Vermont to Keeseville, New York, and modify the community of license of station WWOD(FM) to operate on Channel 282C3 at Keeseville; (3) reallocate Channel 237A from White River Junction, Vermont to Hartford, Vermont, and modify the community of license of station WXLFFM to operate on Channel 237A at Hartford; and (4) reallocate Channel 231A from Keeseville, New York to Morrisonville, New York as that community's first local service (the "Nassau Petition"). In determining whether a reallocation proposal serves the public interest, the Commission compares the existing allotments to the proposed allotments to determine whether the reallocation will result in a preferential arrangement of allotments under the *FM Priorities*.⁴ Retention of the present allotments in the communities of White River Junction, Hartford and Keeseville constitutes Priority 4, while the proposed first local service in the communities of Enfield and Morrisonville constitute Priority 3. Under the Commission's *FM Priorities*, Priority 3 represents a preferential arrangement of allotments when compared to Priority 4.⁵ The Nassau Petition therefore represents a preferential arrangement of allotments because it will provide a new first local service to the communities of Enfield and Morrisonville and will allow WXLFFM to operate as a full Class A facility in Hartford, while retaining a first local service in the communities of White River Junction, Hartford and

⁴ See *Durant, Oklahoma and Tom Bean, Texas*, 20 FCC Rcd 4315, 4315 (Aud. Div. 2005); *Corydon and Lanesville, Indiana*, 20 FCC Rcd 421, 421 (Aud. Div. 2005). The FM allotment priorities are: (1) First fulltime aural service; (2) Second fulltime aural service; (3) First local service; and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3). See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982) (the "*FM Priorities*").

Keeseville. The Commission properly issued the NPRM because the Nassau Petition serves the public interest.

Neither Hall nor RBS dispute the technical qualifications of the Nassau Petition. Nor does either party present a superior proposal to the Nassau Petition. Instead, Hall and RBS raise dubious procedural challenges to discredit the Nassau Petition. Hall and RBS erringly argue that the Nassau Petition is an untimely petition for reconsideration of a previous Commission decision,⁵ analyze the Nassau Petition incorrectly under the FM Priorities, and erringly claim that a counterproposal in a prior proceeding prevents reallocation of a vacant FM allotment. As shown below, Hall and RBS are incorrect on each argument.

The Nassau Petition is not an untimely petition for reconsideration of the Commission's decision in *Keeseville I*.⁷ The Nassau Petition differs significantly from the rulemaking proposal in *Keeseville I*. The rulemaking petition in *Keeseville I* proposed changes in the FM Table of Allotments for the communities of White River Junction, Hartford and Keeseville. The Nassau Petition on the other hand proposes changes in the FM Table of Allotments for the communities of White River Junction, Hartford, Keeseville, Morrisonville and Enfield. The petition in *Keeseville I* proposed only one first local service (to Keeseville) whereas the Nassau Petition proposes two first local services to two different communities (to Morrisonville and Enfield). The Nassau Petition does not seek reconsideration of the Commission's rationale for denying the rulemaking petition in *Keeseville I*; rather the Nassau Petition presents a new proposal that better serves the public interest than the present arrangement of allotments. That the Nassau Petition involves some of the same

⁵ See *Bald Knob and Greenbrier, Arkansas*, 19 FCC Rcd 17458 (Aud. Div. 2004); *Tullahoma, Tennessee and New Market, Alabama*, 19 FCC Rcd 11000, 11002 (Aud. Div. 2004).

⁶ See *Keeseville, New York, Hartford and White River Junction, Vermont*, 19 FCC Rcd 16106 (Aud. Div. 2004) ("*Keeseville I*").

⁷ The Commission presumably was aware of the *Keeseville I* decision when they issued the NPRM, given that the Nassau Petition cites *Keeseville I* at least three times. If the Commission had considered the Nassau Petition as an impermissible reconsideration, the Commission would have dismissed the petition rather than issuing the NPRM. The

communities as the prior rulemaking petition does not make the Nassau Petition an untimely petition for reconsideration of the Commission's decision in *Keeseville I*.⁸

Hall and RBS incorrectly rely upon *Keeseville I* as precedent for denying the Nassau Petition. In *Keeseville I*, the Commission denied the rulemaking petition because the petition and counterproposal in that proceeding each proposed a first local service to the same community.⁹ The Commission in *Keeseville I* undertook a Priority 4 analysis to select among competing proposals instead of the customary Priority 3 analysis because the competing proposals involved the same community.¹⁰ By contrast the Nassau Petition and the Hall Counterproposal propose first local service to different communities, and therefore an analysis of the competing proposals must be undertaken under Priority 3.¹¹ Under Priority 3, the change in community of license for WWOD(FM) and WXLN(FM) is permissible because the changes would result in two first local services.¹²

In their attempt to block the reallocation of Channel 231A from Keeseville to Morrisonville as proposed in the Nassau Petition, Hall and RBS misinterpret the Commission policy for reallocating

issuance of the NPRM is indicative that the Commission does not consider the Nassau Petition an untimely petition for reconsideration of *Keeseville I*.

⁸ In *Perry, Cross City, Holiday, Avon Park, Sarasota and Live Oak, Florida; Thomasville, Georgia*, 11 FCC Rcd 4643 (Aud Div. 1996), and *Beverly Hills, Chiefland, Holiday, Micanopy and Sarasota, Florida*, 8 FCC Rcd 2197 (Alloc. Br. 1993), the FCC considered, accepted and granted a similar rulemaking petition filed in two different proceedings. In the *Perry* proceeding, a petitioner filed a counterproposal proposing reallocations to the communities of Chiefland, Holiday and Sarasota. The Commission rejected the petition as untimely, and the petitioner appealed the FCC's decision. While that appeal was pending with the FCC, the petitioner filed substantially the same petition as a counterproposal in the *Beverly Hills* proceeding. The FCC granted the petition in the *Beverly Hills* proceeding, even though an appeal of the FCC's denial of the same petition was pending in the *Perry* proceeding.

⁹ See *Keeseville I* at 16108.

¹⁰ See *Id.*

¹¹ Although both the Nassau Petition and the Hall Counterproposal propose a first local service to Morrisonville, the Nassau Petition proposes an additional first local service to Enfield.

¹² RBS acknowledges that the Nassau Petition qualifies as Priority 3 because of the provision of two first local services, but argues that this fact is irrelevant. See RBS Comments at pp. 3-4. RBS provides no basis for the FCC to deviate from established precedent or why the rulemaking petition does not serve the public interest. It would appear that RBS's dispute is not with the Nassau Petition, but with the *FM Priorities*, which is outside of the scope of this rulemaking proceeding.

vacant FM Allotments. Hall cites *Montrose and Scranton, Pennsylvania*¹³ and *Billings and Lewiston, Montana*,¹⁴ for the proposition that “the Commission will not delete an allotment when at least one party has expressed an interest in filing for and constructing facilities for the allotment.”¹⁵ In fact, these cases are inapposite because in these cases the Commission declined to reallocate a vacant allotment because there was a pending application for construction permit for the allotment. By contrast, no such application has been filed for the vacant allotment at Keeseville. Hall argues that it expressed an interest in the channel 231A allotment at Keeseville, but neither Hall nor RBS cite any case where the Commission considered a rulemaking proponent’s mere expression of interest in a vacant FM allotment to bar reallocation of that allotment. If Commission policy was to consider a prior expression of interest by a rulemaking proponent as barring future reallocation of a vacant allotment, the Commission could have dismissed the Nassau Petition as procedurally defective rather than issuing the NPRM proposing to adopt the Nassau Petition, or at the very least requesting comment on the specific issue.¹⁶ The issuance of the NPRM is indicative that Commission policy permits the reallocation of a vacant but unapplied for FM allotment.

Even if Hall’s interest in the Channel 231A vacant FM Allotment constituted a expression of interest, that expression can be overcome if the public interest so warrants. In the cases cited by Hall and RBS, the Commission declined to reallocate the vacant FM allotment because only one first local service would be provided. The Nassau Petition proposes two first local services. The public benefit of two first local services is more than sufficient to overcome any expression of interest in the vacant FM Allotment in Keeseville. Moreover, even assuming *arguendo* that the Commission

¹³ 5 FCC Rcd 6305 (1990).

¹⁴ 11 FCC Rcd 8560 (1996).

¹⁵ See Hall Comments at p. 2.

¹⁶ By way of comparison, when a rule making petition proposes the deletion of a vacant allotment (instead of reallocation), Commission policy is to retain the allotment if there is a valid expression of interest filed during the comment period, and the Commission specifically solicits such an expression of interest in the Notice of Proposed

opts to retain Channel 231A in Keeseville, the Nassau Petition would remain superior to Hall's counterproposal. The total number of new first local services provided under the Nassau Petition still would be two (Enfield and Morrisonville), and the total number of new first local services proposed by Hall would be one (Morrisonville). The Nassau Petition's proposal to reallocate 282C3 to Keeseville would provide a second local service to that community, but the valid comparison of the Nassau Petition and the Hall counterproposal would occur under Priority 3, rather than priority 4.

Hall attempts to distract the Commission by suggesting that "a direct comparison of the *first local services* in Nassau's and Hall's proposals reflects that Hall's Counterproposal would better serve the public interest." (emphasis added).¹⁷ In fact, as shown above, the Nassau Petition proposes two new first local services (Enfield and Morrisonville) and retains first local service at Keeseville (channel 282C3), White River Junction and Hartford. By contrast, Hall proposes one new first local service (Morrisonville), the retention of first local service at Keeseville, White River Junction and Hartford, and no new first local service in Enfield, NH. A comparison of the proposals appears in the following table, with new first local services highlighted in **bold**.

| <i>Community</i> | <i>Current Allocation</i> | <i>Nassau Petition</i> | <i>Hall Counterproposal</i> |
|--------------------------|---------------------------|------------------------|-----------------------------|
| Enfield, NH | --- | 282A | --- |
| Morrisonville, NY | --- | 231A | 282C3 |
| Keeseville, NY | 231A | 282C3 | 231A |
| White River Junction, VT | 237A | --- ¹⁸ | 237A |
| Hartford, VT | 282C3 | 237A | 282C3 |

Had Hall accurately made a direct comparison of the first local services contained in the Nassau Petition and Hall's Counterproposal, Hall would have acknowledged (as it must) that the

Rulemaking proceeding. See *Culebra, Puerto Rico*, 19 FCC Rcd 15389 (Aud. Div. 2004). A similar policy does not exist for reallocation of a vacant FM channel.

¹⁷ See Hall Comments at p. 8.

Nassau Petition is superior because it provides two new first local services, while Hall's provides only one. Instead, Hall obfuscates Nassau's real and clearly outlined proposal by suggesting that the Morrisonville proposals are a wash and arguing that Hall's proposal is superior because Keeseville has a larger population than the CDP (not the town) of Enfield. This argument completely ignores Keeseville's *existing* allotment as a first local service (231A) and the fact that the Nassau Petition also would retain first local service to Keeseville. Clearly, Hall is attempting to claim a comparative advantage that it does not have, because both Nassau and Hall propose to provide first local service to Keeseville.

Even assuming *arguendo* that a direct comparison of the populations of Keeseville and Enfield is decisionally significant, Hall still fails. The Nassau Petition shows that Nassau intends to provide city-grade coverage of the town of Enfield. The 2000 Census establishes that the population of the town of Enfield is 4,618 persons, which is 2,768 more persons than Keeseville.¹⁹ Yet Hall would have the Commission believe that the only "community" that would receive service from the Nassau Petition is the census designated place ("CDP") of Enfield (population 1,698 persons), rather than the entire town. Hall relies upon Commission decisions that deem applicants for construction permits in New England towns to have satisfied their coverage obligations by providing service to a smaller urban area within the town's political boundaries (rather the entire town itself)²⁰ as support for its argument that the population of Enfield is limited to the CDP and not the town itself. These decisions are inapposite because the Commission policy outlined in these decisions arose because in some instances applicants could not provide coverage to the entire town

¹⁸ Daytime AM service would be retained as a first local service.

¹⁹ Even if Hall is correct that channel 231A must be retained as an allotment to Keeseville (which would result in 282C3 being a second local service allotment to Keeseville), Enfield's population still exceeds the population of Morrisonville by 2,916 persons.

²⁰ See *Berkshire Broadcasting-South Inc.*, Hearing Designation Order, 2 FCC Rcd 3226 (Aud. Div. 1987); *Andy Valley Broadcasting System, Inc.*, Memorandum Opinion and Order, 12 FCC.2d 3 (1968).

because of the expansive political boundaries established for New England towns.²¹ In those instances, the FCC found that placement of the required signal over the urban portion of the town was sufficient for purposes of showing compliance with coverage requirements at the *application* stage. None of these cases suggest, however, that a *rulemaking* proponent cannot propose to provide service to the entire community located within a town instead of only the urban portions of that town. Such an interpretation would in fact encourage the provision of minimal service particularly where, as here, the CDP comprises less than 40 percent of the town's entire population. The Nassau Petition provides service to the entire town of Enfield and not only the census-designated portion of the town. Thus the population of Enfield is the larger population specified in the Census and not the population of the CDP.

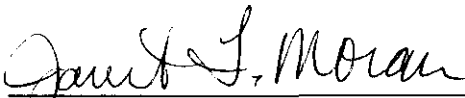
A comparative analysis of the Nassau Petition and Hall Counterproposal requires granting of the Nassau Petition and denying the Hall Counterproposal. Because both proposals offer a first local service to different communities, and a technical solution does not exist to resolve the mutual exclusivity between the two proposals, the Commission must undertake a comparative analysis of the proposals under Priority 3. Both the Nassau Petition and the Hall Counterproposal propose a first local service to the community of Morrisonville. The Nassau Petition, however, proposes an additional first local service to the community of Enfield. The Hall Counterproposal does not propose a first local service to Enfield; indeed the Hall Counterproposal is specifically designed so as to prevent a first local service to Enfield. The public interest favors allocation of two first local services instead of just one first local service. For this reason, the Commission must grant the Nassau Petition and deny the Hall Counterproposal.

²¹ See *Berkshire Broadcasting-South Inc.*, 2 FCC Rcd 3226 (1987) (finding application in compliance with city-grade coverage requirement where political boundaries of town could not be covered); *Andy Valley Broadcasting System, Inc. supra*

WHEREFORE, FOR THE FOREGOING REASONS, NASSAU BROADCASTING, III, L.L.C. hereby requests that the FCC grant the Nassau Petition, deny the Hall and RBS Comments and deny the Hall Counterproposal.

Respectfully submitted,

NASSAU BROADCASTING III, L.L.C.

By: 

Stephen Díaz Gavin
Janet F. Moran
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

Its Counsel

Dated: June 14, 2005

n. 20 at 5 ("there is no possible transmitter site from which the proposed station could place [the required] signal over the entire area within the township boundaries ...").

CERTIFICATE OF SERVICE

I, Lorna Shingleton, an assistant in the law firm of Patton Boggs LLP, Washington, D.C., hereby certify that on the 14th day of June, 2005, a copy of the foregoing **"REPLY COMMENTS"** is being sent via electronic mail, to the following:

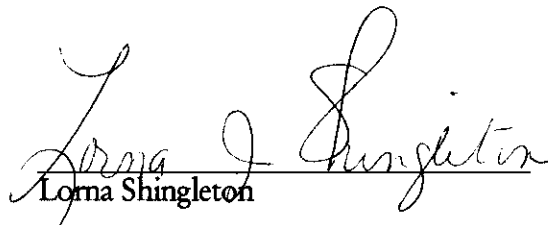
John A. Karousos
Assistant Chief, Audio Division
Media Bureau
445 12th Street, SW, Suite 8B724
Washington, D.C. 20554

R. Barthen Gorman
Federal Communications Commission
Media Bureau
445 12th Street, SW
Washington, DC 20554

and a copy served via first class mail to the following:

Susan A. Marshall
Lee G. Petro
Fletcher, Heald & Hildreth
1300 North 17th Street
11th Floor
Arlington, VA 22209
(counsel for Hall Communications, Inc.)

Barry A. Friedman
Thompson Hine LLP
1920 N Street, NW
Suite 800
Washington, DC 20036
(counsel for Radio Broadcasting Services, Inc.)


Lorna Shingleton